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MICHAEL RODAK, JR., C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-1201

100 ACRES OF LAND, MORE OR LESS, IN MARIN COUNTY, STATE OF CALIFORNIA, DRAKE'S BEACH ESTATES, INC., a corporation, *Petitioner,*

VS.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR DRAKE'S BEACH ESTATES, INC. IN REPLY

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QUESTIONS PRESENTED

According to the Brief for the United States in Opposition to this Petition for Certiorari, the questions presented are as follows:

1) Whether an appropriate rate of interest was applied to the judgment in this condemnation case.

2) Whether attorneys' fees and costs should be awarded to a condemnee in a federal eminent domain proceeding.

Since the questions presented as framed by the United States in its Brief in Opposition vary somewhat from the questions as framed by Petitioner, the following reasons for granting the writ are set forth for the Court's consideration.

REASONS FOR GRANTING WRIT

I.

LITIGATION EXPENSES

Never has this Court clearly had before it, as its primary issue, reimbursement of condemnation litigation expenses thrust upon a faultless owner of property taken by the "public" for a project. Lacking clear just and valid precedent, the issues of compensability of attorneys' fees and litigation expenses reappear again and again in the lower courts.

Simple justice and equity should prevent the public from forcing upon an individual owner more than his just share of the burden of government or of a specific public project. In the words of this Court, when an owner "surrenders to the public something more and different than that which is extracted from other members of the public, a full and just equivalent shall be returned to him."[1]

Pure logic tells us that "just compensation" less litigation expenses must equal something less than "just compensation."

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[1] *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

The intent of the Constitution to fully indemnify an owner has frequently been stated by this Court.[2]

Dohany: Ill-considered and unjust

Surprisingly then, only one Supreme Court case deals with this subject in an eminent domain context. *Dohany v. Rogers,* 281 U.S. 362 (1930) (itself primarily concerned with equal protection and relying upon an equal protection case for precedent) asserts that:

> "Attorneys fees and expenses are not embraced within just compensation for land taken by eminent domain. See *Joslin Manufacturing Co. v. City of Providence,* supra, 262 U.S. 675, 45 S.Ct. 684, 67 L. Ed. 1167. A state may allow the recovery of an attorney's fee in special classes of proceedings while withholding them in others." *Id.* at 368.

This single case stands alone in obvious philosophical conflict with the Constitution and those Supreme Court cases which require full reimbursement of an owner. Because of the rank injustice of the *Dohany* decision, it has spawned a plethora of cases in the lower courts. Repeatedly owners have sought justice, but have been denied relief from this harsh rule.

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[2] *Seaboard Airlines Ry. Co. v. U.S.*, 261 U.S. 299, 304 (1923), ". . . [T]he owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."; *U.S. v. New River Collieries Co.*, 262 U.S. 341, 343 (1923), "The owner was entitled . . . to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

Sovereign Immunity and the Constitutional Mandate of Just Compensation

In the face of the constitutional mandate of just compensation and the well-established policy of full indemnification to an owner by the public which should bear the burden of the cost of a public improvement, lower court decisions (and the government argument in its Brief in Opposition, page 4) try to embrace the doctrine of sovereign immunity to buttress the *Dohany* dicta. But the doctrine of sovereign immunity, itself archaic and obsolete, should not be applied in constitutional cases involving eminent domain and just compensation. How can our federal entity, which was created by the Constitution, seek immunity from a specific constitutional mandate to pay an owner just compensation?[3] Yet this fallacious reasoning persists in lower court decisions as a basis for denying an owner litigation expenses.[4]

Urged by the government, sovereign immunity, i.e., the absence of statute, was the trial court's basis for denial of this owner's request for litigation expenses as "just compensation" under the Constitution. As

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[3]Many eminent domain cases rely on sovereign immunity precedent contained in non-eminent domain opinions to preclude recovery of litigation expenses by a condemnee. They base their logic as follows: "In the absence of a statute, directly and specifically so authorizing, costs and expenses cannot be assessed against the United States." See *U.S. v. Knowles' Estate*, 58 F.2d 718 (9th Cir. 1932); *U.S. v. Pressnell*, 328 F.2d 580 (6th Cir. 1964).

[4]Akin thereto are those cases turning on whether "conformity" statutes subject the United States to state statutes awarding costs. *Carlisle v. Cooper*, 64 F. 472 (denying costs); *U.S. v. Engeman*, 46 F. 898 (awarding costs). Occasionally, cases make no reference to sovereign immunity as such. However, they cite the absence of "statute" or "authority" authorizing taxing of costs

stated by the trial judge, "it appearing that no statutory authorities for the awarding of costs exist, the motion for costs is denied." (RT 5220, 5221). We respectfully urge the concept of sovereign immunity has no place in these enlightened times and certainly should not apply in eminent domain proceedings to frustrate the constitutional mandate of "just" compensation.

Due Process

Due process, too, requires reimbursement of an owner's litigation expenses in an eminent domain action. Just compensation is an essential element of due process of law with respect to the taking of private property for public use. *West v. Chesapeake & P. Tel. Co.*, 295 U.S. 622 (1935). Substance and not form alone can be the concern of due process. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). What protection is the due process clause if, while being awarded just compensation for the land, an owner is forced to expand a substantial proportion of his award to establish the award? The formality and orderly procedure of trial is worthless to an owner

against the United States in condemnation proceedings. *U.S. v. 125.71 acres*, 54 F. Supp. 193 (W.D. Pa. 1944); *In re Post Office*, 210 F. 832 (no statute); *U.S. v. Wade*, 40 F. 745 (no authority). Cases citing the absence of statute (thus invoking sovereign immunity) run afoul of the well-established principle that just compensation is a judicial question and does not rest with Congress. *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893); *U.S. v. New River Collieries Co.*, 262 U.S. 341 (1923); *Phelps v. U.S.*, 274 U.S. 341, 343, 344 (1927); *Shoshone Tribe v. U.S.*, 299 U.S. 476, 497 (1936) (the presence or absence of a statute is immaterial); *U.S. v. Chicago, etc. R. Co.*, 282 U.S. 311 (1931) (an owner's right to compensation is absolute, and the government has no right to impose conditions or qualifications thereon, whether legislative or otherwise).

if the result is denial or substantial impairment of his fundamental right to just compensation. As expressed in *U.S. v. Lee,* 360 F.2d 449 (5th Cir. 1966), recovery of litigation expenses caused by the eminent domain action is required by due process.

Enlightened Rule: Equitable Powers

An enlightened rule would permit the trial court, as a judicial question, to determine whether, on the facts of a given case, equitable principles or the concept of just compensation should compel the court to reimburse to an owner (forced to litigate and who prevails) his reasonable litigation expenses by reason of condemnation proceedings. Cases such as *U.S. v. Lee, supra,* award litigation costs thrust upon an owner under the equitable powers of the trial court and pursuant to the Fifth Amendment (due process and just compensation). This rule is particularly needed, as in the instant case, where an owner is *forced* to litigate.[5]

Coercion and Loss

Under circumstances such as the instant case, an owner has two choices: he either incurs a severe eco-

[5]For example, in the instant case the government refused to make a clear offer, justifying the lack of an offer on the basis that it claimed ownership to the property. In a bifurcated trial on ownership, title eventually was held to be in this property owner, not the government. An offer of $100,000 was tardily made at the valuation phase (RT pre-trial conference Thursday, December 7, 1967, pages 64-70); it was compelled by the trial court. By comparison, the ultimate award was 7 times the initial "offer" (verdict, excluding interest and costs, was $700,000 (CT 472)). Significantly, the government's "offer" was even below its own testimony, ranging from $171,000 (RT 3556) to $265,000 (RT 3995).

nomic loss (gives the property to the public below its realistic value), or he expends substantial sums of money to protect his property interests. The effect is nothing less than economic coercion unless the government, which uses its powers to benefit the public and forces upon an individual owner a disproportionate share of the expense of the public project, is required to reimburse the owner for his losses.

This oppressive use of litigation must be restrained and equality of access to our courts encouraged. The philosophy of the *Lee* case if widely applied assures the availability of courts of justice for "faultless" owners who are required to litigate.

In *U.S. v. Lee, supra,* the owner was awarded as an element of just compensation certain survey costs and expenses related to his successful presentation of evidence resulting in a favorable determination of the size of his property.[6]

A Growing Problem

A growing number of Americans who live in urban ghettos, in suburbs along super highways, and on rural farms adjacent to reclamation, park and other "public projects" are having serious economic losses in the form of litigation expenses (or losses in negotiated settlements) thrust upon them by various public entities. The obvious effect of denial of recovery

[6]In the instant case, litigation expenses related to size and dimensions of the subject parcel exceeded $56,854.50, excluding attorneys' fees (CT 562). Litigation expenses relating to engineering costs, oceanographic fees and appraisal fees necessary to establish market value, highest and best use and related sub-issues exceeded $90,236.36 (CT 562).

of litigation expenses is to discourage owners from having their day in court when they honestly and reasonably differ with the entity's determination of fair market value. For many, the expenses imposed by condemnation proceedings often tip the balance away from economic independence and pride to dependence and indifference.

The government argues that our society is not fiscally strong enough to bear the burden of compensating those who disagree with our government, even those who prevail. Yet our society bears economic burdens far heavier and far less humanistic. Ownership of property and the family institution that it anchors lends stability to our society. Our system of law should induce, not devastate, ownership of property. Property often represents the product of lifelong labor. For our many elderly citizens, property is often the only measure of security they retain.

For the individual who sees large corporations litigate, but is unable to afford the expense of remedying an injustice to himself, not only is our society's promise of equal economic opportunities broken, but economic discrimination sponsored by this form of discriminatory law erodes the individual's faith in the fairness of our system of laws and judicial system. The promises of our Constitution remain unfulfilled. A government intent on meeting budget conscious goals is more and more tempted to misuse its power to coerce settlements.

Only this Court with a direct and well reasoned opinion can put to rest these cries of oppression and

injustice repeatedly urged upon lower courts. The volume of these instances will continue to increase unless an affirmative and clear cut decision is made on this issue.

We respectfully urge the only fair decision is to award litigation expenses in cases such as this, where litigation expenses have been thrust upon an owner, where the owner has prevailed, and where the owner has reasonably incurred expenses.

II.

INTEREST

Constitutional Right

As to interest, the government concedes that the owner's right to payment of interest is a constitutional right.[7] The government must concede this, for a condemnee's right to interest is well established.[8]

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[7]Brief in Opposition, page 4, "Unlike the payment of interest, there is no constitutional right to payment of costs and attorneys' fees in condemnation proceedings."

[8]Interest is an additional element of just compensation for delay. The Fifth Amendment of the Federal Constitution requires that when for any reason the payment of just compensation is postponed, the owner is entitled to an additional element of just compensation for this delay, *U.S. v. Rogers*, 255 U.S. 163 (1921); *Seaboard Airlines Ry. Co. v. United States*, 261 U.S. 299 (1923); *Brooks-Scanlon Corp. v. U.S.*, 265 U.S. 106 (1924); *Jacobs v. U.S.*, 290 U.S. 13, 17 (1933).

An owner's indemnity for his loss may be measured in various ways, depending upon the circumstances of each case. There is no set formula. *U.S. v. Miller*, 317 U.S. 369, 373, 374 (1943).

Interest is merely one measure, a "convenient way" to ascertain the just compensation for the owner's loss by reason of delay of payment. *Shoshone Tribe v. U.S.*, 299 U.S. 476 (1937); *U.S. v. Klamath and Modoc Tribes*, 304 U.S. 119 (1938); *Smyth v. U.S.*, 302 U.S. 329, 333 (1937).

Error Conceded: Issue for Court

The government also concedes error on the part of the Court of Appeals in ruling that the jury, rather than the court, should determine what rate of interest should be applied to a condemnation award.[9] The Ninth Circuit in this case has ruled that the issues of interest and attorneys' fees are for the jury and that evidence thereof must be presented during the case in chief. Citing *U.S. v. Reynolds,* 397 U.S. 14 (1970), the government concedes the Ninth Circuit erred.[10]

Evidence was Timely Presented to Trial Judge

Next, the government fails to reply to, and therefore, evidently concedes, the owner's position that it presented timely evidence to the trial judge. The government has always conceded it was timely; at least the government has never raised timeliness as an issue. It was the Court of Appeals which first raised the issues of timeliness.

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[9]If, as the government concedes, the issue of interest is for the trial judge, then the government has created error in opposing Drake's Beach Estates' motions and thus precluding the trial court from taking evidence on the issue of the rate of interest. In the government's pre-trial statement of December 4, 1967, the government itself demanded a jury to determine only the issue of "fair market value", obviously conceding that to be the limited and only issue to be before the jury.

[10]*U.S. v. Reynolds, supra,* holds that the issue of "scope of the project" is for the trial judge. Scope of the project obviously has some bearing upon highest and best use. Yet there is nothing in *Reynolds* which would require the issue of "highest and best use," traditionally treated as a jury issue, to be determined by the court. And issues of reasonable probability (i.e., zoning change, plottage to adjoining parcels) should likewise continue to be jury issues since *Reynolds* does not alter procedure for their treatment. The trial judge makes preliminary rulings on the admissibility of such evidence. The jury weighs it.

Evidence Was Not Considered by Trial Judge

The government next improperly argues that the trial court properly "considered and rejected" a rate of interest higher than the Declaration of Taking Act.[11] With all due respect, the Solicitor General did not attend the trial or read this record. This is a misrepresentation of the record and false. The Court did not consider and reject the issue of the rate of interest.[12] Rather it held itself bound to a statutory rate.

Thus the owner was denied an opportunity to present any evidence as to the appropriate rate of interest, proceed on its motions, and have the Court exercise its judicial function. This was a clear denial of due process of law and just compensation.[13]

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[11]Brief in Opposition, page 3, "Drake's Beach's claims at issue here were properly considered and rejected on the merits by the district court."

[12]The government's opposition was noted by the Court of Appeals, "the Government opposed awarding interest at a rate in excess of that provided by statute. The trial court denied the motion of Drake's Beach Estates as to interest, but stated that it would have provided a rate of seven percent but for the statute requiring six percent." Petition, App. B., page xxix. This owner does not disagree with the Court of Appeals opinion that "It seems clear that a determination as to the proper rate of interest is a factual question and should be determined by the trier of fact." Petition, App. B., page xxx. This owner does disagree with the Court of Appeals' conclusion that the *jury*, not the judge, should be the trier of that fact.

[13]The Court of Appeals cited *The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States*, 437 F.2d 458 (Ct. Cl. 1971), a Court of Claims case which rejected a claim never presented to the commissioner but first urged on review before the Court of Claims. That case is clearly distinguishable for, as the record below indicates, Drake's Beach Estates made every effort to present evidence on the rate of interest issue via its post-verdict motions to the *trial court*, not the reviewing body.

Prejudice Clear

The government finally argues that there was no prejudice by this error, i.e., that the trial court "reached the right result in affirming the District Court's award of 6%".[14] In support of this contention, the government urges that its own evidence, presented solely on appeal, i.e., the rate of interest paid by the government on commercial bonds for the period between 1965 through 1972,[15] shows no prejudice has occurred.

Again, the trial Court did not consider any evidence on this issue. Certainly it did not consider this evidence tardily offered by the government on appeal.

What the government may have gained or lost, or been unable to gain, is immaterial. The interest rate at which the government may or may not have been able to borrow, reflecting gain or loss to the condemnor, is irrelevant. It is loss to an owner, not gain to the condemnor, which is to be compensated.[16]

Loss to the owner is most fairly measured by what the government prevented the trial Court from considering, i.e., the interest rates lenders have exacted from an owner such as Drake's Beach Estates under the pertinent prevailing market conditions. The owner should receive full and perfect equivalent in

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[14]Brief in Opposition, page 3.

[15]Brief in Opposition, page 4, "Reference to Standard & Poor's Trade and Securities Statistics, however, shows that from 1965 through 1972 the U.S. on the average paid less than 6% on its commercial bonds."

[16]*U.S. v. Causby*, 328 U.S. 256 (1946); *Seaboard Airlines Ry. Co. v. United States*, 261 U.S. 299 (1923); *U. S. v. New River Collieries Co.*, 262 U.S. 341 (1923).

money for his loss. *U.S. v. Miller,* 317 U.S. 369 (1943); *Seaboard Airlines Ry. Co. v. United States,* 261 U.S. 299 (1923). He is entitled to his damages (losses) inflicted by the taking. And the interest rate should be one which is "proper", "fair", and "reasonable".[17]

There has been a serious and substantial loss to Drake's Beach Estates as a result of the trial court's failure to assume its judicial responsibility to determine this element of just compensation, i.e., a proper and reasonable rate of interest. The difference between the 6% awarded and the 8.5% prevailing economic rate requested by Drake's Beach Estates as its true "market" loss for the period in question, from August 31, 1965 to the present date, is obviously quite substantial. This prejudicial error is aggravated when one considers the length of time over which this litigation has extended.

In conclusion, the government, in its Brief in Opposition, offers evidence which properly should have been offered to influence the trial court's fact-finding function at a proper hearing. The government's references to Standard & Poor's Trade and Securities Statistics, or other similar sources, is a tardy offer of evidence before the wrong forum, of the type of evidence which the government objected to and precluded in the trial court to deny this owner due process and just compensation.

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[17] *U.S. v. Klamath and Modoc Tribes,* 304 U.S. 119 (1938); *Phelps v. U.S.,* 274 U.S. 341 (1927); *Shoshone Tribe v. U.S.,* 299 U.S. 476 (1937); *Jacobs v. U.S.,* 290 U.S. 13, 17, 18 (1933).

The issue before this Court, and one which needs clarification is: Should the issue of the rate of interest be determined by the trial court or the jury. If this issue should be decided by the trial judge (as this owner contends, the government concedes, but to which the Court of Appeals does not agree) then the stage of the trial at which this owner attempted to offer its evidence (after verdict and before entry of judgment) was correct, and we respectfully urge this Court issue its writ of certiorari to require the trial court to require a hearing as to this limited issue, i.e., a reasonable rate of interest to *indemnify* this owner for its losses as a constitutionally required element of just compensation to which this owner is entitled. Unless this Court issues its writ of certiorari, the Ninth Circuit Court of Appeals' decision will stand for precedent to place evidence on this important issue before a jury, which, by *U.S. v. Reynolds,* 397 U.S. 14 (1970) should consider only "market value".

If this issue is for the jury, the government itself has misled the trial court and this owner into submitting evidence regarding interest to the Court. Evidence was offered to the trial court after the jury verdict. The error found by the Court of Appeals as to the timeliness and the procedure regarding this offer of evidence was caused by the government, not the owner.[9] The opinion of the Court of Appeals should be modified to so reflect. The owner in this case should have been permitted to proceed before the District Court based upon the procedure urged by the government at pretrial. In either event, the

government has caused error which is prejudicial to this owner. And the rule concerning this procedural matter needs expression by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Burlingame, California,
June 11, 1973.

Respectfully submitted,

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